

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HAVILAH SMITH HAWKINS,	}	No. 11277
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

KEMPER NOMLAND, JR.	}	No. 11278
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

JOHN FRANK RANDALL,	}	No. 11279
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

COMBINED APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon.

GEORGE C. REINMILLER,
525 Failing Building,
Portland, Oregon,
Attorney for Appellants.

HENRY L. HESS, United States Attorney,
E. B. TWINING, Assistant U. S. Attorney,
Attorneys for Appellee.

PAUL P. O'BRIEN,

CLERK

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JURISDICTIONAL STATEMENT

These cases on appeal are from judgments of conviction of appellants by the United States District Court

for the District of Oregon, and a jury had in each case. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third Subdivision (d), Section 723 (a), and rules of the Supreme Court of the United States.

STATEMENT OF CASES

Generally

These are criminal actions instituted in the United States District Court for the District of Oregon, by the return of indictments charging defendants with violation of the Selective Service and Training Act of 1940 as amended, and the regulations thereunder. The defendants are all conscientious objectors classified in classification 4E and assigned to Civilian Public Service Camps. They are charged with deserting Civilian Public Service Camps.

Specifically

(a) United States vs. Havilah Smith Hawkins. The defendant was indicted on June 14, 1945, charged with deserting Civilian Public Service Camp No. 56, Waldport, Oregon on April 26, 1945. He admitted leaving the camp, but contended at the trial that because General Hershey acted illegally in not complying with the law as enacted by Congress, by assigning defendant to work not of national importance, not paying defendant anything, though forcing him to work 8 1/2 hours per day and not furnishing food or clothing to defendant, (Tr. p. 24) reducing defendant to a state of serfdom; that de-

fendant is not required to comply with those illegal administrative orders.

(b) *United States vs. Kemper Nomland, Jr.* The defendant was indicted on June 14, 1945, charged with refusing to report to Civilian Public Service Camp No. 111, Mancos, Colorado upon order of Colonel Lewis Kosch, U. S. Army, after defendant had been assigned to and reported to Civilian Public Service Camp No. 56, Waldport, Oregon. The defendant contends that no evidence has been introduced proving beyond a reasonable doubt that defendant has not reported to Civilian Public Service Camp No. 111, Mancos, Colorado; that if a crime has been committed, it is in the State of Colorado, and the U. S. District Court for the State of Oregon has no jurisdiction, and that the order to transfer is a military order issued by an officer in the United States Army, contrary to the law passed by Congress, and, consequently, a void administrative order which defendant is not required to obey.

(c) *United States vs. John Frank Randall.* The defendant was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp No. 128, LaPine, Oregon. Defendant contends there is no proper evidence before the Court upon which a conviction could be had, because the Selective Service File was improperly admitted into evidence over defendant's objection. (Tr. p. 18). Defendant also contends that his classification was improperly changed from 4F to 1AO and to 4E without legal notice and without opportunity of appeal. Defendant further contends that the Statutes were violated by the Administrator of the Civilian Public Service Camp,

General Lewis B. Hershey, United States Army, in that he was under military control, forced to labor without compensation, and discriminated against on account of his religious belief. Defendant contends he was denied his only defense set out herein by virtue of the instructions to the jury. (Tr. p. 38, 39). Defendant further contends he was subjected to slave labor, was made virtually a serf, and was subjected to punitive measures.

QUESTIONS INVOLVED

I.

Has the Director of Selective Service, General Lewis B. Hershey, authority to require conscientious objectors to remain in a Civilian Public Service camp without paying them the compensation provided by Section 309 (A), Title 50, App., United States Code?

II.

Does the restraint of conscientious objectors without statutory compensation in a Civilian Public Service camp by the Director of Selective Service, who is an officer in the U. S. Army, violate Amendment Thirteen of the Constitution of the United States?

III.

Does the confinement of conscientious objectors in Civilian Public Service Camps violate the First Amendment to the United States Constitution in that it denies liberties guaranteed by the Constitution to individuals on account of their religious beliefs by penalizing them?

IV.

Does a transfer of a conscientious objector from one camp to another by an Army Officer violate the Statute, Section 305, Title 50, U. S. Code Appendix, which provides for civilian direction?

**SPECIFICATION OF ERRORS TO BE
RELIED UPON**

I.

Failure of the Court to instruct the jury to bring in a verdict of not guilty.

II.

Failure of the Court to enter a judgment of not guilty, notwithstanding the verdict of the jury.

III.

Error committed by the court in withdrawing from the consideration of the jury all questions as to the legality of defendant's classification by their local draft board.

ARGUMENT

I.

In all three cases, defendants relied upon the point shown in the transcript that the trial court withdrew from the consideration of the jury the question of whether or not appellants were subjected to military orders, transfers, and controls. (Hawkins Tr. p. 34, 35; Nomland Tr. p. 36; Randall Tr. p. 38, 39).

In *United States of America vs. Americo Chiarito*, 69 Fed. Supl. p. 317, the Court decided:

"There is no claim here that the local Selective Service Board has assigned Chiarito to any other camp or directed him to report or remain in any other camp than No. 59. There was no proof as to who Colonel Kosch is, except that he is an officer of the regular army. There is no showing as to why he attempted to override the assignment by the local board and their order to accused to remain at Camp No. 59. Unless words are emptied of meaning, a military order by a colonel of the regular establishment to a conscientious objector against combatant and non-combatant service and so classified, is in direct violation of the language of the section which provides for assignment by civilians and direction in camp by civilians only. No delegation of authority could justify an action or regulation in direct defiance of the terms of the governing statute.⁹ The issuance of such an order laid no basis for prosecution anywhere.

"In further distinction it must be noted that accused is not a convicted criminal and subject to arbitrary disposal by the Attorney General. It is argued that if he had been classified and inducted into the armed services, he could have been ordered into any state, or abroad, and would have been punished if he had not obeyed. But the very thesis of this statute is that accused is a civilian and is by this law 'under civilian direction.' Whatever we think of the policy of the lawmakers, we must extend to accused the rights of a civilian and the guarantees of the Constitution even in time of war. Accused was bound to report to his local board and accept assignment to a camp. If he failed to report for assignment, or if he left the camp without per-

⁹ This is an entirely different problem from that discussed by some other courts. However, the process whereby regular army officers are permitted to issue regulations and orders to conscientious objectors who are placed by law under civilian direction savors not of rationalization but of perversion.

mission, he was subject to conviction.”¹⁰

A further consideration for the Court is the fact that selectees sent to Civilian Public Service Camps are found, under the law, to be conscientiously opposed to service in the armed forces, and are, therefore, ordered to work of public national importance under Civilian direction, in accordance with the statute. All such camps were placed under the jurisdiction of General Lewis B. Hershey by order of the President, and although appropriations had been made therefor, and in spite of the law which provided that inmates of Civilian Public Service Camps should receive pay and allowances at rates not in excess of those paid to persons inducted into the army, these men, under the military direction of General Hershey and other army officers, were compelled to labor six days per week and eight hours per day with no compensation whatsoever. (Hawkins Tr. p. 24; Randall Tr. p. 27). This virtually imposed serfdom upon appellants:

II.

“Serf: A person adscript to the soil and more or less subject to the will of the owner.” *

It is respectively urged that selectees in a public Service Camp, by the administration requiring them to labor 48 hours per week without compensation, administered punishment for their religious beliefs by restrain-

¹⁰ In order that there may be no misapprehension, the courts have enforced the Selective Training and Service Act consistently throughout the war. Heavy sentences were imposed on violators who failed to report for military service or for assignment to conscientious objector camps, as well as upon deserters from the latter. No person, however, should be deprived of his constitutional rights in a criminal case.

*Webster's Dictionary, Fifth Edition, G. & C. Merriam Co., Springfield, Massachusetts, 1946.

ing them of their liberties and separating them from their families as effectively as if they had been sentenced to a penal institution by judgment of the Court.

“It is not necessary that the persons to be affected by a Bill of Attainder be named in the Bill of Attainder in the 28th year of Henry VIII, against the Earl of Kildare and others. He enacted that: ‘All such persons which be or heretofore have been comforters, abettors, partakers, confederates or adherents under said late Earl in his traitorous acts and purposes, shall and likewise stand and be attained, adjudged and convicted of high treason.’ The Constitutional prohibition was intended to protect every man’s right against that kind of legislation, which seeks either to inflict a penalty without trial or to subject a new penalty on old matter.” (*Cummings vs. Missouri*, 4 Wall, 277, 286 18 Law Ed. 356).

In all three cases, appellants contend that by being sent to the Civilian Public Service Camps under the conditions prescribed by the director of Selective Service, General Lewis B. Hershey, they were deprived of their liberties by legislative action and without jurisdictional trial, and that such action violates the Constitution of the United States:

“A bill of attainder is a legislative act which inflicts punishment without a judicial trial. (U.S. - *Butcher v. Maybury*, D. C. Wash., 8 F. 2d 155). It may be directed against an individual by name or against a whole class, (U.S. - *Cummings v. Missouri*, Mo., 4 Wall. 277, 18 L. Ed. 356 - Ex. p. Law D. C. Ga., 15 F. Cas. No. 8, 126, 35 Ga. 285,) and may inflict punishment either absolutely or conditionally. (U.S. - *Cummings v. Missouri*, Mo., 4 Wall. 277, 18 L. Ed. 356)” (16 *Corpus Juris Secundum*, Section 452).

"A bill of pains and penalties is a legislative act which, without a judicial trial, imposes a punishment less than death; (U.S. - Drehman v. Stifle, Mo., 8 Wall. 595, 19 L. Ed. 508.) and such bills are within the constitutional prohibitions against bills of attainder. (U.S. - Drehman v. Stifle, Mo., 8 Wall 595, 601, 19 L. Ed. 508)" (16 Corpus Juris Secundum, Section 455).

"While ordinarily accounts of attainder were directed at some person or persons designated by name, it seems that they were occasionally directed against a whole class of persons who could be easily ascertained from the descriptions of such persons given in the acts." (Lovett vs. United States, 66 Supreme Court 1073) Ore. Law Rev., Feb. 1947, Bills of Attainder, P. 78.

In the Randall appeal, he was deprived of his right of appeal from the classification given him by his local draft board, in that he was never notified of his change of classification from 4F to 4E (Tr. p. 23). He was thereby denied due process, which is guaranteed by Amendment Five of the Constitution of the United States.

CONCLUSION

The judgment of the Court below should be reversed and the trial court ordered to dismiss the indictments; or in the alternative, new trials should be ordered.

Respectfully,

GEORGE C. REINMILLER

525 Failing Building

Portland, Oregon

Attorney for Defendants - Appellants.

